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No. 06-163

IN THE

Supreme Court of the United States

THE CITY OF NEW YORK, BERNARD KERIK, RUDOLPH GIULIANI, RAYMOND W. KELLY AND MICHAEL R. BLOOMBERG,

Petitioners,

v.

FIFTH AVENUE PRESBYTERIAN CHURCH, GLADYS ESCALERA, NICHOLAS NESRON, WILLIAM P. RASMUSSEN, DONALD J. ROBISON, VERONICA A. LESTER, ALFRED MCKENZIE, ALFRED BROWN, DENNIS PAIGE, PEABODY DENNIS, STEFAN PARY AND MARGARET SHAFER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Fifth Avenue Presbyterian Church's homelessness ministry, which provides sanctuary to "service-resistant" homeless individuals who choose to sleep on the Church's steps, is an exercise of a sincerely-held religious belief protected by the Free Exercise Clause of the First Amendment.

RULE 29.6 STATEMENT

Respondent Fifth Avenue Presbyterian Church is a non-governmental corporation with no parent company. No publicly traded corporation owns 10% or more of this corporation.

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BRIEF OF RESPONDENTS IN OPPOSITION

The City of New York and other Petitioners ("City") present a baseless petition for review of the injunction against dispersing the homeless persons who gather on the steps of the Fifth Avenue Presbyterian Church ("Church"). The district court correctly recognized that these homeless people are provided sanctuary on the steps as part of the Church's homeless ministry and that the City's effort to disperse them violated the Church's First Amendment right to the free exercise of religion.

At most, the City's petition challenges the application of well-settled principles of Free Exercise jurisprudence to the unique facts presented. The City fails to identify any relevant conflict of law among the courts of appeals. Nor does the City make any serious argument that the decisions below are in conflict with any decision of this Court.

Instead, the City's petition merely attacks the *bona fides* of the Church's Homeless Outreach ministry, which is a question of fact that was settled by the district court and affirmed by the court of appeals. Review of that question of fact by this Court is not warranted. Although the City concedes that "*actual* service to the homeless may be part of a religious ministry," Pet. at 11 (emphasis added), it proceeds to make the disturbing argument that a portion of this Church's ministry to the homeless is not an expression of a sincerely-held religious belief because of its alleged "meaninglessness," *id.* at 13, and the City's inability to discern a "correlation of the doctrine and the Church's activity," *id.* at 11. In the City's view, the Church's ministry cannot be an expression of religious belief because its ministry does not measure up to secular standards for a homeless shelter, as expressed in *McCain* v. *Koch*, 511 N.E.2d 62 (N.Y. 1987) (specifying *public* shelter requirements). Pet. at 12.

The City's argument depends heavily on its offensive and unsupportable effort to recharacterize the facts in the record

in order to minimize what the district court considered the "fairly draconian" methods used by the City to remove the homeless from the Church's steps. Pet. App. at A64. The City disingenuously neglects even to mention that the Church's ministry at issue is focused on "service resistant" homeless individuals, who "will not go to shelter if the City is permitted to disperse them; rather, they will find another place on the street upon which to sleep." *Id.* at A43. As the court of appeals correctly found, "[t]he Church views its outdoor space as a sanctuary for the service-resistant homeless who prefer not to sleep in shelters." *Id.* at A31.

Regardless of the City's liberties with the record, the law is settled that "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Employment Div.* v. *Smith*, 494 U.S. 872, 887 (quoting *United States* v. *Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)). Courts properly discern only "whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious." *United States* v. *Seeger*, 380 U.S. 163, 185 (1965). The sincerity of a religious belief cannot be judged by its compliance with a particular law, regulation, or norm of proper civility. As this Court has made clear, religious beliefs need not even be "acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas* v. *Review Bd.*, 450 U.S. 707, 714 (1981). Nothing in this case provides any basis for revisiting any of these settled principles.

The undisputed evidence established that the teachings of the Church at issue here constitute sincerely-held religious beliefs that have been expressed by mainline Christians literally for centuries. It would indeed be difficult to overstate the role of poor and homeless individuals as a symbol and a challenge in Christian scriptures and belief. There can be no doubt that the Church's ministry is a practice of a sincerely-held religious belief and is thus entitled to full First Amend-

ment protection. The unremarkable application of well-settled Free Exercise principles to the facts of this case raises no issues worthy of this Court's attention. The City's petition should therefore be denied.

STATEMENT OF THE CASE

The record in this case provides strong support for the lower courts' central factual finding that the Church's ministry to its service-resistant homeless neighbors is an exercise of a sincerely-held religious belief. Pet. App. at A52-53. The City's obvious unhappiness with the manner in which the Church carries out its religious ministry does not render the Church's belief insincere. Nevertheless, because the City's factual rendition paints a misleading picture of the factual record, we provide a statement here, drawn from the four opinions that have consistently agreed on these facts.[1]

1. *The Nature of the Church's Ministry to its Homeless Neighbors.* The Fifth Avenue Presbyterian Church has a longstanding ministry to local homeless persons that has two distinct components: (1) a formal homeless shelter for ten individuals who reside in the Church's lower level; and (2) a ministry known as its "hospitality program" to individuals who wish to sleep on the Church's steps; these individuals are referred to as the Church's "Homeless Neighbors." Pet. App. at A7-A8 (*Fifth Ave. I*). This latter ministry focuses on homeless individuals who are "service-resistant," that is, who "would be as unlikely to stay in an indoor church shelter as a City shelter." *Id.* at A56 (*Fifth Ave. III*). Many of these individuals fear shelters and prefer sleeping outside in the bays

[1] *Fifth Avenue Presbyterian Church* v. *City of New York*, No. 01 Civ. 11493 (S.D.N.Y. Jan. 4, 2002) (Pet. App. at A5-A26) ("*Fifth Ave. I*"); *Fifth Ave. Presbyterian Church* v. *City of New York*, 293 F.3d 570 (2d Cir. 2002) (Pet. App. at A27-A44) ("*Fifth Ave. II*"); *Fifth Avenue Presbyterian Church* v. *City of New York*, No. 01 Civ. 11493, 2004 WL 2471406 (S.D.N.Y. Oct. 29, 2004) (Pet. App. at A45-A90) ("*Fifth Ave. III*"); *Fifth Avenue Presbyterian Church* v. *City of New York*, 2006 WL 1116119, No. 04-6299-cv (Apr. 26, 2006) (Pet. App. at A91-A94) ("*Fifth Ave. IV*").

and stairways of the Church. *Id.* at A18 n.4 (*Fifth Ave. I*). The Church has instituted its hospitality ministry in an effort to meet these street-hardened individuals where they are emotionally comfortable, to build trust relationships with them and, ultimately, to help them to get off the street. *Id.* at A9 (*Fifth Ave. I*).

Although the Church does not provide night-time indoor facilities to the Homeless Neighbors, it nonetheless carries on an active ministry to them. The Church has dedicated a member of its staff to befriending and serving its Homeless Neighbors, learning their individual needs, and inviting (although not requiring) them to participate in worship services and religious classes, all in an effort to build trust with the Homeless Neighbors and, eventually, to bring them a better quality of life. *Id.* at A8-A11 (*Fifth Ave. I*). In addition, the Church has luncheons, dinners and parties for the service-resistant Homeless Neighbors so that members of the Church may befriend them. Joint Appendix before the Second Circuit ("J.A.") A174 (Declaration of Margaret Shafer (the Church's Associate for Outreach) ("Shafer Decl.") ¶¶ 18(g) & (h)); Pet. App. at A10 (*Fifth Ave. I*). As a result of the relationships of trust that the Church has established with its Homeless Neighbors, dozens have entered housing and treatment centers. Pet. App. at A18 n.4 (*Fifth Ave. I*). The City's position ignores the undisputed fact that this ministry is intended to help homeless individuals transition into a more formal system of support services.

The City's unkind characterization of the Church's outdoor ministry – at one point analogizing it to a "punch[] … in the face," Pet. at 11 – does appalling violence to the true nature of the Church's religious outreach. The Church has thoughtfully tailored its ministry to meet the unique needs of the Homeless Neighbors. Indeed, the City submitted uncontested evidence from a Yale psychology professor establishing the mental health benefits of such a ministry. See J.A. A443-A451 (Declaration of Michael Rowe).

The City's suggestions of a public nuisance are similarly lacking in record support. The uncontested record is that each morning the Church undertakes a thorough clean-up of its steps and sidewalk area, which includes washing both its landings and the alcoves adjacent to the Church, as well as cleaning up any litter. Pet. App. at A73 (*Fifth Ave. III*).[2] The Church's policy also requires the individuals who sleep on its property to refrain from foul language, loud noise, and inappropriate behavior. See *id.* at A7 (*Fifth Ave. I*). The Church recognizes and does not contest the authority of the police to arrest any homeless person who is actually violating the law. *Id.* at A65 (*Fifth Ave. III*). The City, however, has never made such an arrest of a homeless person at the Church, *id.* at A62 (*Fifth Ave. III*), and there is no record evidence whatsoever of any "conduct [that] endangers or injures anyone's health," *id.* at A94 (*Fifth Ave. IV*).[3]

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[2] The Church's policy also permitted individuals to sleep in the bayed areas abutting the Church, as well as recessed stairways attached to the Church. J.A. A15-A16 (Complaint). The legality of the City's effort to disperse the homeless from the bayed areas is still pending both before the district court and on the Church's petition for rehearing of that portion of the decision below, before the court of appeals. *Id.* at A84-A85 (*Fifth Ave. III*).

[3] Few problems have occurred in connection with the Church's outdoor ministry. *Id.* at A72-A74 (*Fifth Ave. III*). The City presented evidence of only a single anonymous complaint regarding the Homeless Neighbors' conduct. *Id.* at A62. The City's allusion to its surveillance videotapes, Pet. at 8, refers to footage taken *after* the City's raids on the Church's outdoor ministry, and which could not been the impetus for the City's actions. The district court dismissed most of the City's contentions concerning the videotapes, describing them accurately as "[m]ere speculation or conclusory allegations." Pet. App. at A68 n.9 (*Fifth Ave. III*). The district court's findings thus belie the City's claim that the "evidence produced revealed an ongoing pattern of anti-social behavior occurring at the overnight encampment on the Church steps." Pet. at 7. Rather, as the district court found, "the record suggests, as would common sense, that the pattern of activity that most consistently characterized the homeless persons' presence on Church property was the lawful act of homeless persons sleeping out-of-doors." Pet. App. at A62 (*Fifth Ave. III*).

Moreover, as the district court observed, there can be no serious dispute that the Church's ministry to the Homeless Neighbors is an expression of a sincerely-held religious belief. *Id.* at A17-A18 (*Fifth Ave. I*); *id* at A51 (*Fifth Ave. III*). The Church's policy regarding its Homeless Neighbors explains that its ministry is a means by which "we seek to express God's unambiguous love and care for those who have sought shelter on our steps." J.A. A250 (Church's Policy Regarding Homeless Persons). A sign above the Church's steps clearly articulates the Church's mission: "This is God's house, all are welcome." J.A. A164-A165 (Schafer Decl. ¶ 7).

2. *The Facts Triggering Litigation.* On November 28, 2001, the City notified the Church that it could no longer use its own steps as a sanctuary for the homeless. *Id.* at A48 (*Fifth Ave. III*). In response, the Church requested a meeting with the City. Before any meeting took place, the City deployed dozens of police in a late-night raid designed to end the Church's ministry. *Id.* at A12-A13 (*Fifth Ave. I*). As the district court found, the City engaged in "fairly draconian" raids that "mobilized twenty-two police officers to the Church 'bearing nightsticks and large clusters of handcuffs,'" and "threatening arrests and accompanied by three police vans, two squad cars, and a paddy wagon." *Id.* at A64 (*Fifth Ave. III*).

The City returned to the scene on the night of December 11, 2001. *Id.* at A12 (*Fifth Ave. III*). The police again awoke all of the Homeless Neighbors, using their nightsticks to bang on the boxes in which they slept. J.A. A179-A180 (Shafer Decl. ¶¶ 29-30); A103 (Affidavit of co-plaintiff Veronica A. Lester ¶ 11); A80 (Affidavit of co-plaintiff Donald J. Robison ¶ 6); A63-A64 (Declaration of co-plaintiff Stefan Pary ¶ 6). The following evening the police were even more aggressive, threatening the Church's Homeless Neighbors with nightsticks, handcuffs and arrest, although no potential charges were identified and no arrests occurred. J.A. A180-A182

(Shafer Decl. ¶¶ 32-34). The City's lack of legal justification was confirmed by then-Police Commissioner Bernard Kerik (curiously present on the nights of at least two of the raids, J.A. at A334-A336), who admitted that he "didn't see a crime being committed" at the time. J.A. at A334 (Deposition of Bernard Kerik, at 27, line 4); Pet. App. at A64 (*Fifth Ave. III*) ("'didn't see a crime being permitted'" [sic]).

3. *Proceedings in the Courts Below.* After similar raids occurred again on December 17, the Church, its Staff Associate for Outreach, and several homeless individuals who had slept on the Church's property filed a complaint under 42 U.S.C. § 1983 against the City and named City officials seeking to enjoin the City's actions. *Id.* at A13 (*Fifth Ave. I*). Another police raid occurred the very next evening, December 18, 2001. *Id.* On December 19, 2001, the district court entered a temporary restraining order forbidding the City from entering onto the Church's property "for the purpose of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property." See *id.* A2.

On January 4, 2002, the district court entered a preliminary injunction that was nearly identical to the temporary restraining order. See *Fifth Ave. I.* In its supporting opinion, the district court made an explicit finding of fact that the Church's ministry was an expression of a sincerely-held religious belief. Pet. App. at A17 (*Fifth Ave. I*). The court of appeals affirmed the district court in a thoughtful opinion that rejected the City's assertions that the ministry was not a legitimate "religious activity within the ambit of the First Amendment" because of the City's disagreement with the manner in which the Church exercised these beliefs. *Id.* at A27-A44 (*Fifth Ave. II*). The court of appeals explicitly refused to inquire into the nature of the Church's exercise, properly applying the well-settled principle of this Court that "[a]n individual claiming a violation of free exercise rights need only demonstrate that the beliefs are 'sincerely held' and in the individual's 'own scheme of things, religious.'" *Id.* at A37 (quoting *Pat-*

rick v. *Lefevre*, 745 F.2d 153, 157 (2d Cir. 1999)). Because it found that the Church's ministry is an exercise of its sincerely-held religious belief, it declared that the Church's outdoor ministry "effectuate[d]" that belief, refraining from any inquiry into the "centrality of [the Church's] professed belief." *Id.* at A37-A38.

After the completion of discovery and cross-motions for summary judgment, the district court granted, in part, the Church's motion for summary judgment, again holding that "the Church's practice of allowing homeless persons to sleep out-of-doors on its property is an 'exercise of sincerely held religious beliefs.'" Pet. App. at A51 (*Fifth Ave. III*) (quoting *Fifth Ave. II*, 293 F.3d at 574).[4] Further, it explained that the City's actions were overbroad and did not match its purported goals, concluding that the actions "were undertaken in a fairly draconian fashion." *Id.* at A64.[5] The district court also observed that the evidence presented showed that the City's actions were not generally applicable, because they "result[ed] in disparate treatment of religious activity by failing 'to prohibit nonreligious conduct that endangers these interests in a similar or greater degree.'" *Id.* at A66 (quoting *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 543 (1993)). Finally, the district court determined that the City's actions also violated the Church's freedom of speech. *Id.* at A78-A80 (*Fifth Ave. III*).[6] The district court limited its permanent injunction, however, to the Church's steps, excluding the bayed areas adjacent to the Church.

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[4] The City's cross motion for summary judgment was denied. *See* Pet. App. at A83-A84 (*Fifth Ave. III*).

[5] The City perhaps reveals its true motives when it argues that the Church's use of its property for its homeless ministry is inappropriate given "the upscale commercial character of the corner of 55th Street and 5th Avenue." Pet. at 15.

[6] The district court did not reach the Church's freedom of association argument. *See* Pet. App. at A80 n.17 (*Fifth Ave. III*).

On cross-appeals, the court of appeals summarily affirmed the injunction, in an unpublished two-page *per curiam* order. *Id.* at A91-A94 (*Fifth Ave. IV*).

REASONS FOR DENYING THE PETITION

The question whether the Fifth Avenue Presbyterian Church actually is exercising its sincerely-held religious beliefs when it invites homeless individuals to take sanctuary on the Church's steps is inherently unworthy of certiorari. The petition identifies no conflicts in the opinions of the court of appeals of any kind and indicates no unanswered question in this Court's jurisprudence.

The basis for the City's challenge is not entirely clear. At times, the City seems implicitly to assert that the Church's belief in giving hospitality to the Homeless Neighbors on its steps is not a "sincerely held religious belief" because its "failure to provide security, toilets and sanitary facilities, and shelter from the elements stands in direct contradiction to" that religious belief. Pet. at i. Whether a particular religious belief is sincerely held by the Church is necessarily a fact-based inquiry, and one which was decided correctly based on undisputed evidence. This Court's review of such a factual claim is unwarranted. See Sup. Ct. R. 10.

The City elsewhere suggests that its challenge is not whether the lower courts found the Church's belief to be sincerely held, but "whether the maintenance of the nightly encampment is conduct that bears any perceptible relation to" that belief. Pet. at 14. To the extent the City's challenge is to the court of appeals' alleged failure to inquire into whether the conduct is a legitimate exercise of the Church's sincerely-held religious belief, such an inquiry is foreclosed by the well-settled principle that a court may properly discern only "whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious." *Seeger*, 380 U.S. at 185. Courts are in no position to

judge religious beliefs to be "acceptable, logical, consistent, or comprehensible." *Thomas,* 450 U.S. at 714.

I. THE COURTS BELOW CORRECTLY APPLIED WELL-SETTLED PROHIBITIONS AGAINST JUDICIAL DEFINITION OF RELIGIOUS BELIEF.

The City purports to recognize the correctness of the principle that courts are precluded from "inquir[ing] into the consistency and rationality of a professed religious doctrine." Pet. at 11 (citing *Thomas*, 450 U.S. at 715). It further acknowledges that "'religious beliefs need not be acceptable, logical, consistent or comprehensible to others to merit First Amendment protection.'" *Id.* at 14 (quoting *Thomas*, 450 U.S. at 715). It asserts, nonetheless, that the district court went "beyond the well established doctrine of *Thomas*" by failing "to [inquire] into the correlation of the [Church's religious] doctrine and the Church's activity." *Id.* at 11. The City thus does not appear to challenge any rule of law, but merely the district court's application of this principle, a ground that does not merit review by this Court.

More critically, the City fails to recognize the district court's faithful application of the principle embodied in *Thomas* and its progeny, *viz.*, that, under *Employment Div., Dep't of Human Res. of Oregon* v. *Smith*, 494 U.S. 872, 886-87 (1990), "courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists." *Fifth Ave.* III at A53 (internal quotation marks omitted). As this Court opined, "[i]t is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field." *Smith*, 494 U.S. at 886-87. "Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Id.* at 887 (quoting *Lee*, 455 U.S. at 263 n.2 (1982)

(Stevens, J., concurring)). This Court has "[r]epeatedly and in many different contexts ... warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id.* Indeed, the law is well-settled that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989); see also *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987)

Thus, the courts below correctly found that the Church's practice of allowing homeless persons to sleep on its outdoor property was, as a factual matter, an exercise of its sincerely-held religious beliefs. Pet. App. at A51 (*Fifth Ave. III*) (citing numerous excerpts from record evidence). Moreover, in response to the City's argument that the act of permitting the Homeless Neighbors to sleep on its steps at night "does not rise to the level of a sincerely held religious belief," *id.* at A52 (citing the City's brief below), the district court declined to venture further, reasoning that applying more exacting scrutiny to the Church's religious practices would "run afoul of the rule that 'courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists.'" *Id.* at A53 (citations omitted).

The court of appeals' articulation of the well-settled principle limiting judicial inquiry into religious practices to the sincerity of those practices is fully consistent with that of every other court of appeals.[7] The City does not even suggest au-

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[7] *See E.E.O.C.* v. *Unión Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49, 56 (1st Cir. 2002) (refusing to question the religious nature of plaintiff's refusal to join a union); *University of Great Falls* v. *N.L.R.B.*, 278 F.3d 1335, 1343 (D.C. Cir. 2002) (explaining, based on *Smith*, that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim"); *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir.

thority to the contrary. With no identified conflict with any appellate decision or holding of this Court, the City's petition boils down to a challenge to the district court's factual findings on the sincerity of the Church's religious conduct, which is no basis for granting certiorari. Sup. Ct. R. 10.

The City's petition falls equally flat were it read to seek review of the court of appeals' purported failure to inquire into "whether the maintenance of the nightly encampment is conduct that bears any perceptible relation to th[e] [Church's religious] doctrine." See Pet. at 14. The City simply does not – and indeed cannot – point to any authority for the proposition that such an inquiry is required. This would be tantamount to an inquiry into the centrality of the outdoor ministry to the Church's faith, which is precisely the type of inquiry this Court's Free Exercise jurisprudence forbids. See *Hernandez*, 490 U.S. at 699; *Thomas*, 450 U.S. at 715.

Even assuming that such a searching inquiry into the Church's religious conduct were proper, the question whether

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2002) (same); *Morrison* v. *Garraghty*, 239 F.3d 648, 658-59 (4th Cir. 2001) (refusing to inquire into the veracity of an inmate's claims of sincerely-held Native American religious beliefs); *Rich* v. *Woodford*, 210 F.3d 961, 963 n.2 (9th Cir. 2000) (declining to examine the "'plausibility of a religious claim'" relating to a sweat lodge purification); *Love* v. *Reed*, 216 F.3d 682, 688 (8th Cir. 2000) ("we will not deny that Love's desire to follow the express dietary laws of the Old Testament is rooted in religion simply because he does not now attempt to draw more broad spiritual lessons from the text"); *Makin* v. *Colorado Dep't. of Corr.*, 183 F.3d 1205, 1213 (10th Cir. 1999) (refusing to consider the validity or importance of certain aspects of Ramadan); *Society of Separationists, Inc.* v. *Herman*, 939 F.2d 1207, 1212 (5th Cir. 1991) (reasoning that a court must provide protection for a religiously motivated refusal to swear an oath even if the court itself finds no religious significance in oath); *Martinelli* v. *Dugger*, 817 F.2d 1499, 1503-04 (11th Cir. 1987) (permitting a Greek Orthodox prisoner to maintain certain practices he claimed to be motivated by sincerely-held religious belief despite a doctrinal debate on their necessity); *Childs* v. *Duckworth*, 705 F.2d 915, 919-20 (7th Cir. 1983) (resolution of what is a religious belief or practice does "'not to turn upon a judicial perception of the particular belief or practice in question'"); *Weaver* v. *Jago*, 675 F.2d 116, 118 (6th Cir. 1982) (same).

the Church's outdoor ministry bore "any perceptible relation," Pet. at 14, to the Church's sincerely held belief in giving hospitality to the homeless was in any event correctly resolved. Citing numerous uncontested references to the factual record, the district court found that the proposition that "the Church's practice of allowing homeless persons to sleep out-of-doors on its property is an 'exercise of sincerely held religious beliefs,' cannot seriously be disputed." Pet. App. at A51-A52 (*Fifth Ave. III*) (citations omitted). The district court also credited the declaration of Ms. Shafer, the Church's outreach associate, that "'[g]iving those persons a place to sleep at night is a central aspect of the Church's hospitality to them.'" *Id.* at A53. These uncontested findings of fact present no basis for this Court's review.

Simply put, the City can point to no deviation from the longstanding principles articulated by this Court and applied consistently by the courts of appeals. As such, it provides no basis upon which to review the decision below. Accordingly, the City's petition should be denied.

II. THE CITY'S STATE LAW ARGUMENTS PRESENT NO LEGAL ISSUE WARRANTING THIS COURT'S REVIEW.

The City also makes a number of arguments in favor of this Court's review based on state law.[8] In particular, it argues that the New York court of appeals' holding in *McCain* v. *Koch*, 511 N.E. 2d 62 (1987), setting the standard of minimally habitable shelter in cases where *the City* provides emergency housing, "provides a useful reference point" for determining whether the Church's outdoor ministry "bears any perceptible relationship" to its belief in serving the needy. Pet. at 13-14. It further argues that the Church's outdoor ministry is not a permissible "accessory use" under Section 12-10

[8] The City is correct in asserting that accessory use argument was not raised at the district court level. *Compare* Pet. at 16 *with Fifth Ave. II* at A58-A59.

of the New York City Zoning Resolution. *Id.* at 14-17. This argument entirely fails given the religious nature of the Homeless Neighbor ministry.

Moreover, as the Second Circuit stated, "*McCain* addressed *a court's* equitable power to issue an injunction requiring the City to provide particular amenities; it did not address the City's power to devise and enforce equitable standards of its own making." Pet. App. at A41 (*Fifth Ave. II*) (emphasis in original). Indeed, the City presents the remarkable proposal that the limitation properly placed by a court on a public social services program should also define the boundaries of appropriate religious expression. Under the City's interpretation, there would be no freedom for religious ministries to operate in a manner that is not blessed by the state. Not surprisingly, the City cites no case to support this claim.

The City's accessory use argument is likewise wrong. As the district court correctly concluded, because the Church's activity is "based upon a sincerely held belief, allowing homeless persons to sleep on [its] property constitutes a proper accessory use." Pet. App. at A58-A59 (*Fifth Ave. III*) (footnote omitted). Moreover, although not expressly addressed by the district court, whether an activity is "'clearly incidental to and customarily found in connection with'" a property's primary use depends not on the primary uses of surrounding properties as the City suggests, see Pet. at 15, but on the primary use of the property in question. See, *e.g.*, *N.Y. Botanical Garden* v. *Bd. of Standards & Appeals*, 694 N.E.2d 413, 423-424 (N.Y. 1998).

The City's arguments are not only wrong but also wrong in ways that are deeply unworthy of certiorari. Its arguments involve purely fact-specific questions based on New York law. This has not been the business of this Court for more than 50 years. See, *e.g.*, *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

CONCLUSION

For the foregoing reasons, the City's petition for certiorari should be denied.

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